OBJECTIVE 1.3 Identify constitutional law, statutory law, and case law governing civil liability for emergency driving that "shocks the conscience" in its deprivation of federal constitutional rights.

Emergency Driving That Shocks The Conscience

INTRODUCTION

The federal constitution may impose liability on officers who conduct police pursuits in a manner that "shocks the conscience" in the risk created for the public. The officer's degree of fault must exceed mere recklessness before liability is created under the "shocks the conscience" standard adopted by the United States Supreme Court in *County of Sacramento v. Lewis,* 523 U.S. 833, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998) which is discussed at **Case Twenty-Nine** below. Pursuits that "shock the conscience" may also give rise to liability of the governmental employer or the supervising officer for an unconstitutional policy or custom or for failure to train.

HISTORICAL CONTEXT

As discussed in Objectives 1.1 and 1.2, law enforcement officers must be mindful of various state laws that bear on emergency and non-emergency law enforcement driving. State tort laws may apply to non-emergency law enforcement driving. State laws often grant emergency driving exemptions and limited immunities to law enforcement officers. These state emergency exemption statutes may impose special duties on law enforcement emergency driving. Each state is largely free to legislate as it sees fit in defining the conditions that govern emergency vehicle operation.

The federal constitution and federal statutes define another set of legal rights and obligations. Law enforcement officers employed by state and local governments cannot, under the authority of state law, violate rights secured to people under the federal constitution. Section 1983 of title 42 of the U.S. code allows persons to sue governmental defendants, such as law enforcement officers and agencies, for deprivation of rights, privileges or immunities under the federal constitution. The Fourteenth Amendment of the federal constitution, in particular, guarantees the right to substantive due process. The Fourteenth Amendment provides, in part, that "no State shall…deprive any person of life, liberty, or property, without due process of law. Persons injured during a police pursuit may claim that the pursuit deprived them of their right to substantive due process under the Fourteenth Amendment.

Over the years, several U.S. Supreme Court decisions have paved the way for individuals to sue law enforcement officers and their employing towns, cities, or counties for deprivation of federal constitutional rights. In 1961, the Supreme Court ruled that an individual could sue state and local law enforcement officers who violated a right guaranteed by the federal constitution. *Monroe v. Pape*, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961), *overruled by Monell v. Dep't of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), *overruled in part by Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989). For the first time, money damages could be recovered from individual officers who violate federal rights.

In 1978, the Supreme Court extended the right to recover money damages for a constitutional deprivation to allow suits against towns, cities, and counties with a policy or custom that violated a federal constitutional right. *Monell v. Dep't of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). Under *Monell*, liability is imposed on a town, city, or county government only if the injured party can prove an official policy or unofficial custom caused the deprivation of a federal right. However, a local governmental employer is not liable simply because one of its law enforcement officers violates a federal right. The constitutional deprivation must be the product of a governmental policy or custom.

In 1989, the Supreme Court recognized a suit against a town, city, or county for having a policy of deliberate indifference to inadequate training of its law enforcement officers. *City of Canton v. Harris*, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989). If officers receive little or no training to the point constitutional violations are almost inevitable, the employing town, city, or county may be liable for "failure to train."

SUBSTANTIVE DUE PROCESS CLAIMS

By 1998, it was well-established that persons injured or killed in high speed pursuits could bring suits against police officers and municipalities alleging violation of substantive due process rights under the Fourteenth Amendment. However, federal courts were divided on what standard of culpability should apply to the conduct of the police in these pursuit cases. Most circuit courts had adopted one of the following standards: (1) gross negligence; (2) reckless or deliberate indifference; or (3) shocks the conscience. Compare *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987), *later proceeding*, 1991 Tenn. App. LEXIS 372 (1991) (gross negligence); *Medina v. City & Cty of Denver*, 960 F.2d 1493 (10th Cir. 1992) (recklessness or deliberate indifference); *Medeiros v. Town of South Kingstown*, 821 F. Supp. 823 (D.R.I. 1993) (recklessness or deliberate indifference); *Temkin v. Frederick Cty Comm'rs*, 945 F.2d 716 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095, 117 L. Ed. 2d 417, 112 S. Ct. 1172 (1992) (shocks the conscience); *Fagan v. Vineland*, 22 F.3d 1296 (3rd Cir. 1994) (shocks the conscience); *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996), *cert. denied*, 520 U.S. 1210, 137 L.

Ed. 2d 820, 117 S. Ct. 1193 (1997) (shocks the conscience).

In 1998, the Supreme Court decided *County of Sacramento v. Lewis* and settled the issue: the shocks the conscience standard applies to police conduct in pursuit cases brought under the Fourteenth Amendment.

SHOCKS THE CONSCIENCE TEST

In *County of Sacramento v. Lewis*, the Supreme Court addressed when high speed pursuits may constitute substantive due process violations. The Court held that an officer is liable for a substantive due process violation for persons injured in high speed chases only where the officer's conduct "shocks the conscience." Conscience-shocking behavior for pursuits can be found only where the officer has "an intent to harm suspects physically or to worsen their legal plight."

Case Twenty-Nine: Fatal Pursuit Doesn't Shock the Conscience

COUNTY OF SACRAMENTO v. LEWIS, 523 U.S. 833, 140 L. Ed. 2d 1043, 118 S. Ct. 1708 (1998), *on remand*, 150 F.3d 1223 (1998).

Returning to their patrol cars after responding to a call regarding a fight in progress, a deputy sheriff and a police officer saw a motorcycle approaching at a high rate of speed. An 18-year-old was driving the motorcycle with the 16-year-old owner of the motorcycle as his passenger. The officer activated his cruiser's emergency lights, yelled at the boys to halt, and pulled his cruiser closer to the other patrol car in an attempt to block the path of the motorcycle. Instead of stopping, the driver slowed down, maneuvered the motorcycle between the patrol cars, and then sped away. The deputy turned on his cruiser's siren and emergency lights and pursued the motorcycle.

During the chase, the motorcycle wove in and out of oncoming traffic for 75 seconds over 1.3 miles in a residential neighborhood, forcing a bicyclist and at least two cars to veer off the road. The motorcycle also made three sharp left turns and ran four stop lights. Both the motorcycle and the patrol car reached speeds of up to 100 mph, and the deputy followed as close as 100 feet. The pursuit ended when the driver lost control while trying to make a sharp left turn and the motorcycle flipped over. Although the deputy slammed on his brakes, he was unable to stop and crashed into the motorcycle. The patrol car skidded and hit the passenger who suffered extensive injuries and died at the scene. The driver managed to get out of the way and was not hit by the patrol car.

The passenger's parents brought suit against the county, the county sheriff's department, and the deputy alleging a deprivation of their son's substantive due process rights under the Fourteenth Amendment in violation of 42 U.S.C. §1983.

The Ninth Circuit Court of Appeals held that the appropriate standard of conduct to apply to law enforcement officers in the context of high-speed vehicular pursuits was "deliberate indifference" or "reckless disregard" for an individual's right to life and liberty. Reversing the Ninth Circuit, the Supreme Court held that a much higher standard of fault than "deliberate indifference" must be shown for officer liability in a police pursuit. The Court adopted the "shocks the conscience" standard and stated:

> *"Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their plight do not give rise to liability under the Fourteenth Amendment, redressible (sic) by an action under §1983."*

The Court then explained why the deputy's fault failed to meet the "shocks the conscience" test:

> *"[The deputy] was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause [the driver's] high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes. [The driver's] outrageous behavior was practically instantaneous, and so was [the deputy's] instinctive response. While prudence would have repressed the reaction, [the deputy's] instinct was to do his job as a law enforcement officer, not to induce [the driver's] lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing considerations, and while [the deputy] exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part."*

The "shocks the conscience" test adopted in *Lewis* poses a high standard for plaintiffs in police pursuit cases brought under the Fourteenth Amendment. Since *Lewis*, several federal and state courts have addressed the issue of whether a police pursuit violated the injured party's substantive due process rights under the Fourteenth Amendment. These courts have applied the "shocks the conscience" test, and most have found that a reasonable jury could not find that the officer's conduct shocks the

conscience. For example, see *Courville v. City of Lake Charles*, 720 So.2d 789 (La. Ct. App. 3d Cir. 1998) (late night high speed chase of suspected burglar which ended with suspect crashing into telephone pole did not shock the conscience); *Davis v. Township of Hillside*, 190 F.3d 167 (3rd Cir. 1999), *cert. denied*, 120 S. Ct. 982, 200 U.S. LEXIS 863 (2000) (high speed chase which ended with suspect colliding with two other cars and one of those cars hitting and severely injuring pedestrian did not shock the conscience).

Several federal courts have also held that the "shocks the conscience" test applies not only to harm caused to those pursued in a high speed chase but also to harm caused to other drivers or pedestrians. See the *Davis* case above, and *Onossian v. Block*, 175 F.3d 1169 (9th Cir. 1999), *cert. denied*, *Torres v. Bonilla*, 145 L. Ed. 2d 385, 120 S. Ct. 498, 1999 U.S. LEXIS 7543 (1999) (high speed chase of reckless driver which ended with reckless driver crashing into another car and injuring occupants did not shock the conscience). And at least one federal court has suggested that the *Lewis* decision and its "shocks the conscience" standard applies not only in pursuits but also in other emergency driving situations. See *Gillyard v. Stylios*, 1998 U.S. District LEXIS 20251 (E.D. Pa. 1998) ("shocks the conscience" standard applied where officers responding to fellow officer's request for emergency assistance hit and killed pedestrian and his 7-month-old son).

While the "shocks the conscience" test may pose a difficult hurdle for plaintiffs in pursuit cases brought under the Fourteenth Amendment, the standard is not impossible to meet as evidenced by the district court decision in the next case.

Case Thirty: Fatal Pursuit May Shock the Conscience

FEIST v. SIMONSON, 36 F. Supp. 2d 1136 (D. Minn. 1999).

A Minneapolis police officer stopped a car fitting the reported description of a stolen vehicle. When the officer requested the suspect and his passenger put their hands in the air, the driver refused and sped away. The officer pursued the suspect through the streets of Minneapolis as the suspect turned the wrong way down one-way streets and nearly caused several collisions. At one point, the suspect entered a highway, exited the highway over a grassy median, and then re-entered the highway going in the opposite direction of traffic. The driver drove erratically, forcing several cars off the road to avoid being hit. The officer, along with three other patrol cars that had joined the pursuit, shadowed the suspect's driving pattern.

The pursuing officers were no longer calling out the traffic conditions and, concerned that the chase had gone on so long under dangerous conditions, the chase supervisor left the precinct and headed for the highway. The chase supervisor claimed that he was about to call off the chase because of the dangers of an upcoming tunnel. Before the chase could be called off, however, a crash occurred. As traffic on the highway slowed to a halt, a limousine driver swerved onto a shoulder to avoid hitting the car in front of him. As he turned onto the shoulder, the suspect struck the limousine driver at a closing speed estimated at 97-104 mph. The limousine driver was crushed and killed in the crash.

The limousine driver's mother filed suit against the officers and the city, alleging a deprivation of her son's substantive due process rights under the Fourteenth Amendment in violation of 42 U.S.C. §1983.

The Minnesota district court applied the "shocks the conscience" test from Lewis, but distinguished the facts of this case from the facts of Lewis. The district court held that, while the initial decision to pursue was justified, the situation "escalated into one of greater and greater potential for harm to the general public." The court stated:

> *"What began as a chase down residential roads soon escalated to a high-speed run through stop lights and down the wrong way of busy one-way streets. What then became a dangerous pursuit entering a busy interstate eventually became a deadly pursuit back onto the same interstate, this time heading at break-neck speeds the wrong direction against heavy traffic."*

The court went on to say that the officer had many opportunities during the chase to balance the need to catch the suspect against the threat to the public. The court pointed out that there was no indication that, had the officer suspended the chase, the police department would not have eventually apprehended the suspect. The court held that the officer's conduct reveals genuine issues of material fact as to whether his actions "shocked the conscience" for the purpose of a substantive due process claim.

GOVERNMENTAL OR SUPERVISORY LIABILITY

Police pursuits that "shock the conscience" may not only expose the pursuing officers to liability but also may expose the governmental employer and the pursuit supervisor to liability. An employing town, city, or county may be directly responsible under 42 U.S.C. §1983 when an employee executes a governmental policy or custom that inflicts constitutional injury. See *Monell v. Dep't of Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), also discussed earlier. Third parties injured in collisions during a police pursuit may claim that the police department had an official policy or an unofficial custom of encouraging high-speed chases of suspects at the expense of the safety of the public, that is, that the policy or custom was a product of deliberate or reckless indifference.

To succeed on a claim based on an unconstitutional policy or custom, the plaintiff must prove the following: (1) an official policy or unofficial custom of unconstitutional misconduct, (2) a deliberate indifference to or tacit authorization of such misconduct; and (3) the policy or custom was the moving

force behind the constitutional violation. *Feist v. Simonson*, 36 F. Supp. 2d 1136, 1149 (D. Minn. 1999), also discussed earlier at **Case Thirty**. These requirements present a formidable burden for plaintiffs. See *Feist v. Simonson*, 36 F. Supp. 2d 1136 (D. Minn. 1999) ("statistics regarding the number of past pursuits and the lack of resulting disciplinary action is not sufficient to prove a policy or custom"); *Fulkerson v. City of Lancaster*, 801 F. Supp. 1476 (E.D. Pa. 1992), *affirmed without opinion*, 993 F.2d 876 (3d Cir. 1993)(simply citing fact that department's officers have pursued minor traffic offenders at high speeds in past without evidence of injuries or collisions is not sufficient). But see *Gillyard v. Stylios*, 1998 U.S. Dist. LEXIS 20251 (E.D. Pa. 1998) (plaintiff's evidence of large number of preventable collisions during pursuits, failure of police department to discipline officers causing preventable collisions, violation of city directive on safe driving and state traffic laws, and ignored internal requests to enforce safe driving techniques more strictly held sufficient evidence of implicit policy sanctioning reckless driving to present a jury issue).

A governmental employer (or a supervising police officer) may also be liable under 42 U.S.C. §1983 for constitutional injuries caused by the failure to train police officers. Third parties injured in collisions during a police pursuit may claim that the employing town, city, or county, and/or the police officer supervising the pursuit failed to train the pursuing officers in high-speed chases.

However, an action for failure to train will lie "only where the failure amounts to deliberate indifference to the rights of persons with whom the police come into contact." The failure to train must be coupled with a deliberate or conscious choice in order to rise to the level of a governmental policy or custom. In other words, "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy-makers of the city can reasonably be said to have been deliberately indifferent to the need." Finally, the failure to train must be the cause of the constitutional violation. See *City of Canton v. Harris*, 489 U.S. 378, 389-390, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989), also discussed earlier.

Again, this deliberate indifference standard can be difficult for plaintiffs to meet. In *Canton*, the Supreme Court was careful to note that governmental liability for failure to train will not be had merely because an individual officer is insufficiently trained or because an individual officer makes a mistake. See *Williams v. Musser*, 1997 U.S. Dist. LEXIS 10388 (N.D. Ill. 1997) (where written pursuit policy prohibits intentionally damaging suspect's car and lists factors to consider during pursuits, and officers received basic police training in compliance with state law, plaintiff's assertion that city should have provided practical training on how to interpret and apply pursuit policy is insufficient evidence of failure to train); *Smith v. City of New Baltimore*, 1999 U.S. Dist. LEXIS 20196 (E.D.S.D. Mich. 1999) (plaintiff's assertions that department failed to discipline pursuing officer for previous collisions and failed to give dispatcher copy of pursuit policy were not sufficient to state a claim for failure to train).

Whether the liability of a governmental employer for failure to train or for an unconstitutional policy or custom depends on the liability of the pursuing officer is in dispute. Some courts hold that a governmental employer can only be liable for failure to train or for an unconstitutional policy or custom if the police officer violates the federal constitution. That is, if a pursuing officer's conduct during a pursuit does *not* shock the conscience, then the officer has not violated the constitution and the officer's governmental employer cannot be held liable for an unconstitutional policy or custom or for failure to train. For example, see *Hildebrandt v. City of Fairbanks*, 957 P.2d 974 (Ala. 1998) (pursuing officer's conduct did not shock the conscience so employing city cannot be held liable for failure to train). Other courts hold that independent claims for failure to train and for unconstitutional policy or custom can be maintained against a governmental employer despite the exoneration of the involved police officers. See *Smith v. City of New Baltimore*, 1999 U.S. Dist. LEXIS 20196 (E.D.S.D. Mich. 1999) (plaintiff's cause of action for failure to train is not automatically terminated by the officer's exoneration); *Gillyard v. Stylios*, 1998 U.S. Dist. LEXIS 20251 (E.D. Pa. 1998) (governmental employer can be liable for failure to train even if no individual officer participating in the pursuit violated the federal constitution).

GENERAL PRINCIPLES

General principles of federal constitutional law relating to law enforcement emergency driving include the following:

1. Law enforcement driving that is negligent or reckless under state tort law is not necessarily a deprivation of federal constitutional rights under the Fourth Amendment.

2. A collision between officer and bystander, or between officer and suspect, or between suspect and bystander, is not a deprivation of constitutional rights unless the conduct of the officer is so outrageously dangerous as to "shock the conscience," the substantive due process standard. Plaintiffs find that standard difficult to prove since it requires almost intentional disregard of a near unavoidable risk of serious injury.

3. A governmental employer may not be liable for an unconstitutional policy or custom simply because departmental policy allows high-speed chases. Constitutional liability requires that the policy or custom require or implicitly sanction unconstitutional conduct.

4. A local governmental employer or supervisory officer may not be liable for failure to train simply because a particular officer was inadequately trained in pursuit driving. Constitutional liability requires deliberate indifference to the need for more or better training

SUMMARY

In addition to filing state claims, persons injured during police pursuits may also seek redress against the pursuing officers and their agency under federal constitutional law. These plaintiffs argue that the pursuit deprived them of their right to substantive due process under the Fourteenth Amendment. However, a much higher standard—the "shocks the conscience" standard—applies in these federal cases. Under the "shocks the conscience" standard, the officer's conduct must exceed mere recklessness before liability is created. Police pursuits that "shock the conscience" may not only expose the pursuing officers to liability but also may expose the governmental employer and the supervisory officer to liability for failure to train or for an unconstitutional policy or custom.

SUGGESTED INSTRUCTIONAL METHODOLOGY

LECTURE WITH SLIDES

With slides of various environmental factors, have students identify how the factors create a situation which is more demanding of the driver's skills and attention.

LECTURE AND CLASS DISCUSSION

Utilize case summaries to present legal principles and involve students in discussion of relevant issues

SMALL GROUPS WITH CASE STUDIES

In groups of 3-6, present each group with the cases provided above and additional fact situations. Involve small groups in discussion of cases and develop group questions for the instructor to address in subsequent lectures.

RESOURCES AND AIDS

1. Relevant federal constitutional and statutory provisions.

2. Agency policies.

Objective 1.3 Legal Aspects of Law Enforcement Driving

SUGGESTED EVALUATION METHODOLOGY

STUDENTS

1. Written or verbal response to questions regarding legal principles.

2. Observation of strategies, decisions, or methods used by a driver when exposed to various driving scenarios.

COURSE

1. Observe the driving of officers during the simulations of emergency vehicle operations.

2. Review agency collision reports for failure to heed legal considerations.